

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTONIO PRADO,)	Case No. 09-4419 SC
)	
Plaintiff,)	ORDER RE: DEFENDANT'S MOTION
)	FOR SUMMARY ADJUDICATION AND
v.)	PLAINTIFF'S MOTION TO
)	AUGMENT OR FOR LEAVE TO
ALLIED DOMEQ SPIRITS AND WINE)	<u>CONDUCT DISCOVERY</u>
GROUP DISABILITY INCOME POLICY,)	
)	
Defendant.)	
)	
)	
LIBERTY LIFE ASSURANCE COMPANY OF)	
BOSTON,)	
)	
Real Party in Interest.)	

I. INTRODUCTION

Plaintiff Antonio Prado ("Plaintiff") brought this action against the Allied Domecq Spirits and Wine Group Disability Income Policy ("Defendant" or "the Plan"), alleging a failure to extend disability benefits in accordance with the Plan and the Employee Retirement Income Security Act of 1974 ("ERISA"), 28 U.S.C. § 1132. The Real Party in Interest is the Plan Administrator, Liberty Life Assurance Company of Boston ("Liberty"). Now before the Court are two fully briefed motions. Liberty filed a Motion for Summary Adjudication on the Applicable Standard of Review. ECF Nos. 21 ("Liberty's Mot."), 27 ("Opp'n to Liberty's Mot."), 32 ("Liberty's Reply"). Plaintiff filed a Motion for an Order Directing Defendant

1 to Augment the Administrative Record and for Leave to Conduct
2 Discovery. ECF Nos. 25 ("Pl.'s Mot."), 29 ("Opp'n to Pl.'s Mot."),
3 34 ("Pl.'s Reply"). Pursuant to Civil Local Rule 7-1(b), the Court
4 finds the motions suitable for determination without oral argument.
5 Because they were filed concurrently and involve overlapping legal
6 issues, the Court rules on both motions in this Order. For the
7 following reasons, the Court GRANTS IN PART and DENIES IN PART
8 Plaintiff's Motion and GRANTS Liberty's Motion for Summary
9 Adjudication on the Applicable Standard of Review.

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11 **II. BACKGROUND**

12 Plaintiff was injured on September 2, 2003 while employed by
13 Allied Domecq Spirits and Wine ("Allied"). Compl. ¶ 4. Plaintiff
14 applied for long-term disability under Allied's disability plan.
15 Id. ¶ 5. Under the Plan, claimants receive funds for up to twenty-
16 four months if an injury renders them unable to work in their "own
17 occupation," and receive payments beyond that time period if they
18 are unable to work in "any occupation" for which they are
19 reasonably qualified. Padway Decl. Ex. C ("Cert. of Coverage") at
20 SPD006-007.¹

21 Liberty denied Plaintiff's claim. Compl. ¶ 5. In 2005,
22 Plaintiff filed suit, alleging failure to extend benefits under a
23 plan covered by ERISA. Id. This Court granted summary judgment
24 for Plaintiff. Prado v. Allied Domecq Spirits and Wine Group
25 Disability Income Policy, No. 05-2716, 2008 WL 191985 (N.D. Cal.
26 Jan. 22, 2008) ("Prado I"). The Court found that because Liberty
27 acted both as the plan administrator and the funding source for

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¹ Laurence Padway ("Padway"), counsel for Plaintiff, filed a
Declaration in support of Plaintiff's Motion. ECF No. 26.

benefits, it operated under a structural conflict of interest. Id. at 5. The Court found that this conflict of interest, as well as other factors, supported its finding that Liberty abused its discretion in denying Plaintiff's claim. Id. at 20. The Court found that Plaintiff was unable to perform his "own occupation" for the first twenty-four months of his injury, and remanded the matter to the Plan for a determination on whether Plaintiff should receive benefits beyond the twenty-four month period due to an inability to perform "any occupation." Id. at 21. Following remand, the Plan denied Plaintiff's claim, finding insufficient objective evidence of a disability. Compl. ¶ 6.

In this second suit, Plaintiff brings three causes of action: (1) review of denial of ERISA benefits; (2) violation of California Insurance Code Section 10111.2; and (3) failure to produce records under 29 U.S.C. § 1332. As to this third cause of action, Plaintiff claims that Liberty was obligated to make available certain documents during his claim review and failed to do so, and that as a consequence Plaintiff is entitled to fees. See Compl.

III. LEGAL STANDARD

A. Summary Adjudication

A court may grant summary adjudication -- also known as partial summary judgment -- if there is no genuine dispute of material fact as to a portion of a claim or issue and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c), Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n. 3 (9th Cir. 1981).

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B. Standard of Review

ERISA benefits determinations are to be reviewed de novo unless the language of the plan documents give the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Met. Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 2348 (2008). Where an administrator has retained discretionary authority, abuse of discretion is the appropriate standard of review. Id. A plan administrator that also acts as the funding source for benefits operates under a "structural" conflict of interest. Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 965 (9th Cir. 2006). Such a conflict "must be weighed as a factor in determining whether there is an abuse of discretion." Glenn, 128 S.Ct. at 2348. This leads to an abuse-of-discretion standard "tempered by skepticism commensurate with the plan administrator's conflict of interest." Abatie, 458 F.3d at 959.

C. Evidence Beyond the Administrative Record

A court's abuse-of-discretion review of an ERISA claim denial is generally limited to the record before the plan administrator. Jebian v. Hewlett-Packard Co. Emp. Benefits Org. Income Prot. Plan, 349 F.3d 1098, 1110 (9th Cir. 2003). However, if the denial is made by an administrator operating under a conflict of interest, the court has discretion to permit discovery beyond the administrative record into the nature, extent, and effect of this conflict on the administrator's decision-making process. Welch v. Met. Life Ins. Co., 480 F.3d 942, 949-50 (9th Cir. 2007). In addition, an administrator's failure to follow a procedural requirement may permit evidence outside the administrative record. Abatie, 458 F.3d at 972-73.

1 **IV. DISCUSSION**

2 **A. Standard of Review**

3 Plaintiff advances two arguments that de novo review is the
4 proper standard of review. First, Plaintiff argues that Liberty
5 has not established that the Plan documents give it discretion to
6 determine claim eligibility. Opp'n to Liberty's Mot. at 1.

7 Liberty counters that this Court determined that the Plan
8 conferred discretion to Liberty in Prado I and suggests collateral
9 estoppel should bar Plaintiff from relitigating this issue.
10 Liberty's Reply at 2. "Under the judicially-developed doctrine of
11 collateral estoppel, once a court has decided an issue of fact or
12 law necessary to its judgment, that decision is conclusive in a
13 subsequent suit based on a different cause of action involving a
14 party to the prior litigation." U.S. v. Mendoza, 464 U.S. 154, 159
15 (1984). In Prado I, this Court found that the plan documents gave
16 Liberty discretion to determine claim eligibility, and thus abuse-
17 of-discretion review was proper. See Prado I, No. 05-2716, 2006 WL
18 3388572 (N.D. Cal. Nov. 22, 2006). Because this identical issue
19 was both decided and actually litigated in Prado I and was
20 necessary to its final judgment, the Court's earlier finding will
21 control in this action.

22 Plaintiff's second argument is that de novo review is the
23 proper standard because Liberty failed to deny the claim within the
24 deadlines provided by U.S. Department of Labor regulations. Opp'n
25 to Liberty's Mot. at 6. Plaintiff cites Jebian, 349 F.3d at 1107,
26 for the proposition that "where the Plan fails to decide the claim
27 within the appropriate time limit, the claim is deemed denied and
28 de novo review results." Id. Under 29 C.F.R. § 2560.503-

1 1(i)(1)(i) and (i)(3)(i), a plan administrator reviewing an appeal
2 of a benefit denial must notify the claimant of its decision within
3 forty-five days of receipt of the claimant's appeal request. If
4 special circumstances require additional time, the administrator is
5 permitted a forty-five-day extension if, within the first forty-
6 five days, it notifies the claimant that additional time is
7 necessary and indicates the special circumstances necessitating the
8 extension. Id. Plaintiff alleges that Liberty did not send
9 Plaintiff an extension notice that provided the "special
10 circumstances" necessitating the extension until September 23, 2009
11 -- fifty-eight days after Liberty received Plaintiff's appeal.
12 Opp'n to Liberty's Mot. at 3-6. Plaintiff claims that under
13 Jebian, this violation necessitates de novo review. Id.

14 Liberty counters that Plaintiff quotes Jebian out of context,
15 and that even if Liberty committed minor procedural violations, de
16 novo review would be improper. Liberty's Reply at 8-9. Liberty
17 claims it sent two letters before the September 23, 2009 letter in
18 which it notified Plaintiff that additional time would be
19 necessary, and argues that while the "special circumstances" were
20 not explicitly stated in these letters, they could be reasonably
21 inferred from the conduct of the parties. Liberty's Mot. at 5-7.

22 The Court finds three major differences between the case at
23 hand and Jebian. First, in Jebian, the delay was considerably
24 longer, involving "[o]ne hundred nineteen days of 'radio silence.'"
25 349 F.3d at 1107. Here, if one assumes all facts in favor of
26 Plaintiff, the delay is twelve days. The correspondence between
27 parties during this time demonstrates the sort of "ongoing, good
28 faith exchange of information between the administrator and

1 claimant" that renders a procedural error "inconsequential" and
2 does not mandate de novo review. Id. Second, in Jebian, the
3 plan's conduct violated not only Department of Labor regulations,
4 but also the terms of the plan itself, and the Ninth Circuit
5 stressed that this was a factor in its determination that de novo
6 review applied. Id. at 1106 n.6. Plaintiff does not allege that
7 Allied's plan contains similar language. Third, Jebian's holding
8 rests on a Department of Labor regulation requiring claims not
9 decided within the time limitations to be "deemed denied." Id. at
10 1103 n.5. The "deemed denied" language has since been excised from
11 these regulations. See 29 C.F.R. § 2560.503-1(h).

12 For the foregoing reasons, Jebian is distinguished, and abuse
13 of discretion is the appropriate standard of review. In Prado I,
14 the Court also found that Liberty's joint roles as plan
15 administrator and payee constituted a structural conflict of
16 interest, and the Court considered this conflict in determining
17 whether Liberty had abused its discretion. Prado I, 2008 WL
18 191985. Because this issue was decided and actually litigated in
19 Prado I and was necessary to its final judgment, Liberty is
20 estopped from arguing no conflict existed. Thus, the Court will
21 apply the abuse-of-discretion standard in reviewing Liberty's claim
22 denial, tempering this review with skepticism commensurate with
23 Liberty's conflict of interest.

24 **B. Evidence Beyond the Administrative Record**

25 During Liberty's assessment of Plaintiff's appeal, Plaintiff
26 made several requests for additional information from Liberty to
27 "prepare an appropriate appeal." Gray Decl. Ex. B ("Apr. 12, 2009
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Letter").² Plaintiff's April 12, 2009 letter is a four-page, single-spaced document requesting a number of documents. Id. In response, Liberty wrote: "We do not agree with your interpretation of the scope of Liberty's disclosure obligations under ERISA and we are unable to respond to your extensive requests for information." Gray Decl. Ex. C ("Apr. 30, 2009 Letter"). Plaintiff made another request for information during the appeal, and this was also denied by Liberty. See Gray Decl. Ex. G ("Sept. 6, 2009 Letter"), Ex. J ("Sept. 23, 2009 Letter").

Now, Plaintiff seeks an order requiring Liberty to augment the administrative record with much of the same information, or, in the alternative, to allow Plaintiff to conduct discovery. See Pl.'s Mot. The documents Plaintiff seeks fall into two broad and overlapping categories: (1) documents Plaintiff claims are relevant to show the nature, extent, and effect of Liberty's conflict of interest; and (2) documents Plaintiff argues he was entitled to receive during the claim determination process under Department of Labor regulations. The Court will discuss both categories in turn.

1. Documents Relevant to Liberty's Structural Conflict of Interest

While a district court generally limits its abuse-of-discretion review of a benefits denial to the administrative record, the court may, in its discretion, permit discovery of the nature, extent, and effect of an administrator's structural conflict of interest. Welch, 480 F.3d at 949-50. Plaintiff claims he has made requests that are calculated to uncover "bias of the consulting physicians," "financial interest of the claims

² Lisa Gray ("Gray"), appeal review consultant for Liberty, filed a Declaration in support of Liberty's Motion. ECF No. 23.

1 adjusters," and "the economic effect of discretionary clauses"
2 (that is, whether Liberty denies more claims when it retains
3 discretion than when it does not). Pl.'s Reply at 6-9. Plaintiff
4 seeks, among other things, Liberty's policies and procedures "to
5 ensure that similarly situated claimants are treated alike," the
6 number of total reports that the physicians who reviewed
7 Plaintiff's claim have performed for Liberty on other appeals, and
8 the number of these reports that were favorable and unfavorable to
9 the granting of benefits. Pl.'s Mot. at 10-11. Plaintiff
10 identifies several recent cases where courts permitted discovery
11 into this type of evidence. See Taylor v. SmithKline Beecham
12 Corp., 629 F. Supp. 2d 1032 (C.D. Cal. 2009), Santos v. Quebecor
13 World Longer Term Disability Plan, 354 F.R.D. 643 (E.D. Cal. 2009).

14 Liberty admits that "the Court may consider evidence outside
15 the administrative record for the limited purpose of deciding the
16 nature, extent, and effect on the decision making process of any
17 conflict of interest." Opp'n to Pl.'s Mot. at 11. However,
18 Liberty argues that the scope of Plaintiff's discovery exceeds the
19 permissible bounds "in that it calls for documents outside the
20 administrative record on which Liberty Life did not rely to reach
21 its claim determination; which call for exposure of how and why
22 Liberty Life's claims decisions were made and whether they were
23 'correct' and which are neither relevant nor admissible to evaluate
24 whether Liberty Life abused its discretion or the merits of its
25 claim determination." Id. at 12. Liberty makes a number of other
26 objections, including claiming that Plaintiff "calls for private,
27 trade secret, proprietary and/or confidential commercial
28 information regarding defendant's processes, operations, work, or

1 apparatus which has not been made public and may have the effect of
2 causing harm to defendant's competitive position." Id. The Court
3 finds these objections too broad, too nebulous, and too
4 unsubstantiated to rule on them in this Order. Liberty must make
5 its objections during discovery consistent with the Federal Rules
6 of Civil Procedure and this district's Civil Local Rules.

7 The Court holds that Plaintiff is entitled to conduct limited
8 discovery into the nature, extent, and effect of Liberty's conflict
9 of interest on its decision-making process. The Court stresses,
10 however, that this Order is not a fishing license. Plaintiff must
11 "conduct discovery in a way that is limited to specific and
12 meaningful information and that does not result in harassment
13 through burdensome responses." Id. at 13.

14 2. Documents Plaintiff Argues Liberty Was Obligated to
15 Produce During Its Claim Assessment

16 Plaintiff seeks an order compelling Liberty to augment the
17 administrative record with documents Plaintiff requested and did
18 not receive during Liberty's claim determination, or to permit
19 discovery of these documents. In addition to the above-mentioned
20 evidence of Liberty's conflict of interest, Plaintiff seeks:

21 1. The Hiram Walker and Sons Long Term
22 Disability Plan, Plan number 507 and any
amendments thereto.

23 2. The insurance policy issued by Liberty
24 Mutual to insure the Plan, and the application
for the policy, and any amendments thereto;

25 3. Any writing by which the Plan has
26 delegated discretion to determine eligibility
27 for benefits to Liberty Life Assurance Company
of Boston ("Liberty").

28 4. All writings which establish that the Plan
has complied with 29 C.F.R. § 2560.503-1(b)(5),

1 and all writings by which the Plan has complied
2 with that section.

3 3. [sic] All administrative policies and
4 procedures and the documents which (1) contain
5 the standards for how Liberty evaluates
6 disability claims; (2) contain standards for
7 how Liberty evaluates impairment due to chronic
8 pain, (2) contain the medical basis for those
9 standards (3) conveys those standards and how
10 they are used to the adjusters and (4)
11 evaluates whether the adjusters comply with
12 those standards.

13 4. All writings "relevant" to Mr. Prado's
14 claim, as that term is defined in 29 C.F.R. §
15 2560-503-1(m)(8);

16 Pl.'s Mot. at 1.

17 Plaintiff claims he is entitled to these documents under 29
18 C.F.R. § 2560.503-1(h)(2)(iii), which states:

19 [T]he claims procedures of a plan will not be
20 deemed to provide a claimant with a reasonable
21 opportunity for a full and fair review of a
22 claim and adverse benefit determination unless
23 the claims procedures . . . [p]rovide that a
24 claimant shall be provided, upon request and
25 free of charge, reasonable access to, and
26 copies of, all documents, records, and other
27 information relevant to the claimant's claim
28 for benefits.

Section (m)(8) defines what is "relevant to the claimant's claim"
as any information that:

(i) Was relied upon in making the benefit
determination;

(ii) Was submitted, considered, or generated in
the course of making the benefit determination,
without regard to whether such document,
record, or other information was relied upon in
making the benefit determination;

(iii) Demonstrates compliance with the
administrative processes and safeguards
required pursuant to paragraph (b)(5) of this
section in making the benefit determination; or

(iv) . . . constitutes a statement of policy or
guidance with respect to the plan concerning

1 the denied treatment option or benefit for the
2 claimant's diagnosis, without regard to whether
3 such advice or statement was relied upon in
4 making the benefit determination.

5 Plaintiff suggests Liberty's failure to produce this
6 information during the claim review constitutes a procedural error.
7 Pl.'s Mot. at 6-8. "When a plan administrator has failed to follow
8 a procedural requirement of ERISA, the court may have to consider
9 evidence outside the administrative record." Abatie, 458 F.3d at
10 972-73. "For example, if the administrator did not provide a full
11 and fair hearing, as required by ERISA, 29 U.S.C. § 1133(2), the
12 court must be in a position to assess the effect of that failure
13 and, before it can do so, must permit the participant to present
14 additional evidence." Id. at 973.

15 Liberty claims that the two documents it produced -- the Group
16 Disability Income Policy and the Certificate of Coverage -- are the
17 only plan documents. Opp'n to Pl.'s Mot. at 6-8. To authenticate
18 these documents and support this statement, Liberty filed a
19 declaration of Carolyn McNerney ("McNerney"), the Plan's assistant
20 corporate secretary. McNerney Decl. ¶¶ 3-5.³ Plaintiff objects to
21 the McNerney declaration, claiming that Liberty did not identify
22 McNerney as a potential witness in its initial Rule 26 disclosures,
23 and that McNerney "does not disclose her relationship to Allied
24 Domecq, does not claim to be the Plan Administrator, does not
25 identify who the Plan Administrator might be and provides no basis
26 for her conclusion that she is authorized to authenticate these two
27 documents as constituting the Plan." Opp'n to Liberty's Mot. at 2.

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³ McNerney filed a declaration in support of Liberty's Motion. ECF No. 22.

1 Under Rule 37 of the Federal Rules of Civil Procedure, a party
2 that fails to identify a witness as required by Rule 26(a) or 26(e)
3 may not use that information or witness to supply evidence on a
4 motion, at a hearing, or at a trial, unless the failure was
5 substantially justified or is harmless. Liberty claims that
6 McNerney's "identity and the need for her declaration had not been
7 determined at the time Defendant prepared its initial disclosure,
8 and she has now been added to a supplemental initial disclosure."
9 Liberty's Reply at 3. Liberty does not address Plaintiff's other
10 challenges, including that McNerney failed to substantiate her
11 claim that she is authorized to authenticate the plan documents.
12 The Court finds this failure to disclose McNerney is neither
13 justified nor harmless, and SUSTAINS Plaintiff's objection.

14 Plaintiff argues that it is entitled to Plan documents not
15 disclosed to challenge Liberty's claim that the documents provide
16 Liberty with discretion to determine claims, and also because
17 "[s]ometimes discrepancies exist between the Plan, the insurance
18 policy, and other plan documents. . . . [Plaintiff] is entitled
19 to the document which is most favorable to his position." Pl.'s
20 Mot. at 8. While Plaintiff is estopped from relitigating the
21 discretion issue, Plaintiff must have all the Plan documents to
22 properly litigate this action. Similarly, the Court needs these
23 documents, as well as any policies guiding Liberty's decision-
24 making, to determine if Liberty abused its discretion in denying
25 Plaintiff's claims. For these reasons, Plaintiff is permitted to
26 conduct discovery of the Plan documents and all information
27 relevant to his claim under 29 C.F.R. § 2560.503-1(m)(8).

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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS Real Party in
3 Interest Liberty Life Assurance Company of Boston's Motion for
4 Summary Adjudication on the Applicable Standard of Review, and
5 holds that the standard of review is abuse of discretion tempered
6 with skepticism commensurate with Liberty's conflict of interest.
7 The court GRANTS IN PART AND DENIES IN PART Plaintiff Antonio
8 Prado's Motion for Order Directing Defendant to Augment the
9 Administrative Record and for Leave to Conduct Discovery.
10 Plaintiff's motion to augment is DENIED; Plaintiff's motion for
11 leave to conduct discovery is GRANTED. Plaintiff may seek in
12 discovery from Liberty the full set of Plan documents, all of
13 Liberty's administrative procedures which relate to the handling of
14 disability claims, and all other information relevant to
15 Plaintiff's claim. Plaintiff may also conduct limited discovery
16 into the nature, extent, and effect of Liberty's conflict of
17 interest on its decision-making process. Parties shall appear for
18 a status conference in Courtroom No. 1, 17th Floor, United States
19 Courthouse, 450 Golden Gate Avenue, San Francisco, California, on
20 November 15, 2010 at 10:00 a.m. Parties shall file a joint case
21 management statement seven days prior to the hearing.

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23 IT IS SO ORDERED.

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25 Dated: August 2, 2010

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UNITED STATES DISTRICT JUDGE